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IDAHO PERSONNEL COMMISSION

STATE OF IDAHO

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)	
IDAHO DEPARTMENT OF CORRECTION,)	
)	
Petitioner,)	
)	IPC NO. 96-11
)	
vs.)	
)	DECISION AND ORDER ON
RICK ANDERSON,)	PETITION FOR REVIEW
)	
Respondent.)	
_____)	

THIS MATTER CAME ON FOR HEARING ON THE PETITION FOR REVIEW on June 12, 1998. Petitioner Idaho Dep't of Corrections (DOC) was represented by Michaelina Murphy and Timothy McNeese, Deputy Attorneys General. Mr. McNeese argued. Respondent Rick Anderson (Anderson) was represented by Jim Jones, Esq.. The petition for review involves the hearing officer's decision dated December 31, 1997. We AFFIRM.

I.

BACKGROUND AND PRIOR PROCEEDINGS

A. Facts.

This is a dismissal case. This matter arose as a result of the now infamous “Pribble incident” which first came to light in August of 1994.

In June, 1994 Anderson was a classified employee working as the manager of the Receiving and Diagnostic Unit (RDU) at DOC, a position he had held since June of 1991. The RDU was housed within the Idaho Maximum Security Institution (IMSI). Its purpose was to evaluate and classify inmates entering the correctional system to determine appropriate housing and security needs. RDU consisted of three cell blocks, E, F, and G. Female inmates were housed in Block F in June of 1994.

In the latter part of June, 1994, Correctional Officer (CO) Pribble is alleged to have made a sexual advance toward Karole White, a female inmate at RDU. Allegedly, Pribble approached inmate White from behind, put his arm around her waist, pulled her against his body, and told her to “bend over and wiggle.” Inmate White pulled away and asked CO Pribble to leave her alone. Inmate White reported the incident to CO Jeannette Weeks a day or two later. CO Weeks subsequently made an oral report to Anderson regarding the incident.

At the time that this initial allegation arose, there were two separate chains of command in the RDU: Anderson reported to the warden of IMSI (Arvin J. Arave) and was responsible for supervising the professional staff in the RDU--the psychologist, social workers, and educational and medical staff who were responsible for classifying inmates entering the correctional system. The security staff, which consisted of correctional officers and their supervisory sergeants, lieutenants and captain reported to the Deputy Warden, Security. At the time that inmate White reported CO

Pribble's behavior to CO Weeks, Weeks' sergeant (O. E. Smith) and lieutenant were on leave. For this reason, CO Weeks reported White's allegations to Anderson.

When Sgt. Smith returned from vacation, Anderson conducted a meeting including Smith, Weeks, Pribble, and White to consider White's allegations. CO Pribble was advised of White's allegations, which he denied. Anderson noted that he had read White's file which indicated that she had a history of being untruthful and manipulative. When asked about the truth of her allegations, White began to cry, apologized to CO Pribble, and said that it wouldn't happen again. Sgt. Smith made a notation in CO Pribble's tracking file (the informal working personnel file) regarding the incident, and may have mentioned the incident to his supervisor, Lt. Jefferies. Anderson, Weeks and Smith all believed that inmate White had lied in making the initial allegations. No further action was taken regarding inmate White's allegations by any staff at RDU or IMSI.

At about the same time that White came forward with her allegations, Bona Miller, warden of the Pocatello Women's Correctional Center (PWCC) received written complaints from two inmates alleging that CO Pribble had molested female inmates at RDU. Warden Miller neither acted on the written complaints, nor reported them up her chain of command. About a month later, Warden Miller mentioned the complaints to Warden Arave and other prison officials at a warden's meeting. During the period between her receipt of the complaints, and her mentioning them to Warden Arave, another inmate, Paula Walker, was molested by CO Pribble. On August 11, inmate White filed a written complaint reiterating her June allegations against CO Pribble.

In August, 1994, CO Pribble was charged with having sexual contact with female inmates housed at RDU. He eventually pleaded guilty to felony charges and is serving a sentence in an out-of-state prison. The entire matter is commonly referred to as the "Pribble incident."

When the actions of CO Pribble came to light in August of 1994, DOC director James Spalding appointed George Bernick, Chief of Prison Operations, to investigate. As a part of his

investigation, Bernick obtained reports of the White allegations from RDU personnel. Those reports, dated between August 15 and August 18, 1994, disclosed to Director Spalding how Anderson and Smith had handled the White accusations.

Also in August, 1994, Spalding convened a serious incident panel to review and make recommendations regarding operations at IMSI and RDU. The panel made its report on August 24. Among its findings: Chiefly, that female inmates should not be housed at RDU; secondarily, that if female inmates must be housed at RDU, some changes in staffing patterns were recommended, that the chain of command be clarified, and that RDU staff receive some additional training. The panel did not, nor was it intended to address personnel issues.

About the time the panel issued its report, documents concerning the “Pribble incident,” including Pribble’s tracking file, the Bernick investigation file, and many other original documents pertaining to the matter were collected and destroyed upon the orders and with the knowledge of DOC management. At this time, Anderson began keeping copies of documents at his home for safekeeping. At some point, Sgt. Smith gave Anderson a copy of Pribble’s tracking file for safekeeping.

A year later, on August 21, 1995, Governor Batt wrote Director Spalding concerning the “Pribble incident.” The Governor expressed his view that DOC had made only a cursory review of the incident. He called for a full investigation of the matter. This led to an investigation of the incident by the Idaho Bureau of Investigation (IBI), an arm of the Idaho Department of Law Enforcement.

Shortly after the beginning of the IBI investigation, Spalding notified Anderson that his position as RDU manager was being abolished. Anderson took a voluntary demotion to a Human Services Supervisor position in lieu of layoff.

The IBI investigation took five months, involved five investigators, and included interviews of over two hundred forty individuals. According to the investigators, the primary obstacle to the investigation was the discovery that the majority of relevant documents had been destroyed. Without backup documents, individuals were forced to rely upon their memory for events which had transpired over a year before. This resulted in many factual inconsistencies that could not be resolved by reference to documents made at or near the time the events took place. Requests for any and all documents which might possibly be related to the Pribble incident were an important part of every interview. Anderson was interviewed by the IBI investigators on three separate occasions regarding his knowledge of CO Pribble's activities and his handling of the White accusations. Anderson directed his secretary, Lois Rivers, to provide the investigators copies of all documents that RDU had retained pertaining to operational issues and the Pribble matter. During each interview he was asked if he possessed any documents which might shed light on the matter under investigation. He consistently replied in the negative.

The IBI investigative report was provided to Governor Batt in January, 1996. The IBI report identified one DOC employee, Dave Paskett, for consideration of criminal prosecution. At that time, Paskett was administrator of prisons. Paskett was the individual who, with the director's consent, destroyed the records concerning the Pribble matter. No charges were ever filed.

A copy of the IBI report was provided to DOC in April, 1996 accompanied by a request from the Governor for a report explaining what had been done to remediate the problems leading to and resulting from the Pribble incident, and asking the Board of Corrections to "consider actions against personnel who failed to act appropriately in this case." (Exhibit 121). Director Spalding responded by letter of even date admitting that "[r]eporting procedures within the IMSI and the IDOC during the period in question appeared unclear. Not only procedures for reporting events, but also chain of command reporting authority for staff in the receiving and diagnostic unit (RDU)."

Spalding further advised that “[a]ppropriate personnel actions will be taken in accordance with personnel commission regulations.” (Exhibit 125).

A subsequent letter dated May 29, 1996 from Spalding to the Board of Corrections (which was forwarded to the Governor with a memo from the Board), (Exhibit 14), advised that Dave Paskett had been reassigned from administrator of prisons to warden at IMSI; Arvin J. Arave, the former warden of IMSI was allowed to retire; and Bona Miller, warden at PWCC was given a written reprimand and two weeks leave without pay. The letter further advised that Anderson and Sgt. Smith were being investigated further (including polygraph examinations) to determine whether they had supervisory involvement in the Pribble matter. At the time, Sgt. Smith was on medical leave from which he never returned.

When Spalding received the IBI report, he directed Phyllis Blunck, personnel manager, to review the document and identify areas where additional inquiry might be useful. Based on Blunck’s review, Spalding sent Anderson a memo dated May 2 identifying six areas where more information was requested. (Exhibit 11). Anderson responded on May 9. (Exhibit 12). Included with his response were copies of a number of documents which he had been keeping at his home. Testimony at the hearing indicated that these documents were a duplicate set of the documents which Anderson had previously directed Lois Rivers to turn over to the IBI investigators.

On May 17, 1996, director Spalding requested that Anderson take a polygraph examination. The examination was scheduled for May 21. Anderson appeared for the May 21 polygraph. During the pre-test interview, Anderson revealed that on the previous evening he had discovered at his home some documents (Sgt. Smith’s tracking file on Pribble) pertaining to the Pribble incident. Anderson was unable to complete the polygraph that day, and the exam was rescheduled for May 24. Anderson appeared for the May 24 exam and brought the recently discovered documents with him and turned them over to the polygraph examiner. The documents appeared to be copies of

documents from Pribble's tracking file, the originals of which had been destroyed. Anderson recalled that the documents had been given to him by Sgt. Smith and that he had taken them home and placed them with copies of documents from his files. While most of the documents were not relevant to the IBI investigation, one document, unsigned and undated, appeared to be a notation about White's allegations. Anderson completed the second polygraph exam. Testimony at the hearing indicates that the results were inconclusive. The polygraph results were not offered into evidence at the hearing.

On July 9, 1996, Anderson was given a notice of contemplated action. The notice did not identify any IPC rule or DOC policy that Anderson had violated. The notice discussed, in part, Spalding's concerns about Anderson's integrity and judgment, the inconclusive results of the polygraph exam, the withholding of documents from the IBI investigators, inconsistencies in Anderson's statements to the IBI investigators, Anderson's handling of White's complaint about Pribble, and Anderson's failure to report the White incident to Arave. The notice concluded that action up to and including dismissal was contemplated, and provided Anderson three days to reply.

Anderson's attorney, Michael Kane, responded to the director on July 12. On August 9, Anderson received the memorandum from Director Spalding dismissing him. The director again cited inconsistencies in Anderson's testimony and the failure to turn over documents in his possession in support of Spalding's conclusions that Anderson had refused to cooperate in the Pribble investigation. The director also referenced Anderson's failure to report the White incident to his supervisor as evidence of his lack of good judgment. Director Spalding found that Anderson's actions or inactions violated three provisions of DOC policy 217-A:

Section 2,2: Failing or refusing to cooperate in an investigation into alleged illegal activities or violation of Department regulations.

Section 2,11: Failing to properly discharge the duties of his/her position, including, but not limited to, making every reasonable effort to prevent the escape of any client.

Section 2, 19: Engaging in any other activity which is deemed detrimental to the proper discharge of duties as an employee of the Department of Correction which may come into conflict with the attainment of the goals of the Department.

(Exhibit 17). Director Spalding dismissed Anderson for violating IPC Rule 190.01.a (Failure to perform the duties and carry out the obligations imposed by the state constitution, state statutes, or rules of the department or the Personnel Commission) and IPC Rule 190.01.e (Insubordination or conduct unbecoming a state employee or conduct detrimental to good order and discipline in the department).

Anderson grieved his dismissal, and the matter eventually was heard by an impartial review panel. The panel issued its recommendation on September 27, 1996. It determined that DOC lacked proper cause to terminate Anderson and recommended that Anderson be reinstated to his position as human services manager, that he be compensated for the legal fees he incurred in the action, and that his benefit accounts be credited for any lost time.

On October 10, director Spalding rejected the recommendations of the impartial review panel and upheld Anderson's dismissal, effective October 10, 1996.

B. Appeal to Personnel Commission.

Anderson filed a timely appeal of his dismissal. The matter was assigned to Hearing Officer Bergquist, and the appeal was heard on April 28-30 and May 2, 1997. The hearing officer concluded that DOC had failed to prove, by a preponderance of the evidence, that Anderson had violated the identified DOC policies or IPC Rules 190.01.a or 190.01.e, and ordered Anderson's reinstatement with all back pay and benefits. In addition, the hearing officer determined that the discharge was without any reasonable basis in fact or law, and awarded Anderson attorney fees and costs in the amount of \$14,976.10.

DOC filed a timely petition for review, alleging errors in Findings of Fact nos. 3, 5-12, and 14 and conclusions of law III-XIII.

II.

ISSUES

A. Did the hearing officer err in his determination that DOC failed to prove, by a preponderance of the evidence, that Anderson had violated Rule 190.01.a (failure to perform the duties and carry out the obligations imposed by the state constitution, state statutes, or rules of the department or the Personnel Commission)?

B. Did the hearing officer err in his determination that DOC failed to prove, by a preponderance of the evidence, that Anderson had violated Rule 190.01.e (Insubordination or conduct unbecoming a state employee or conduct detrimental to good order and discipline in the department)?

III.

STANDARD AND SCOPE OF REVIEW

The standard and scope of review on disciplinary appeals to the IPC is as follows:

When a matter is appealed to the Idaho Personnel Commission it is initially assigned to a Hearing Officer. I.C. § 67-5316(3). The Hearing Officer conducts a full evidentiary hearing and may allow motion and discovery practice before entering a decision containing findings of fact and conclusions of law. In cases involving Rule 190 discipline, the state must prove its case by a preponderance of the evidence. IDAPA 28.01.01.201.06. That is, the burden of proof is on the state to show that at least one of the proper cause reasons for dismissal, as listed in I.C. § 67-5309(n) and IDAPA 28.01.01.190.01, exist by a preponderance of the evidence.

On a petition for review to the Idaho Personnel Commission, the Commission reviews the record, transcript, and briefs submitted by the parties. Findings of fact must be supported by substantial, competent evidence. *Hansen v. Idaho Dep't of Correction*, IPC No. 94-42 (December 15, 1995). We exercise free review over issues of law. The Commission may affirm, reverse or modify the decision of the Hearing Officer, may remand the matter, or may dismiss it for lack of jurisdiction. I.C. § 67-5317(1).

Soong v. Idaho Dep't of Health and Welfare, IPC No. 94-03 (February 21, 1996), *aff'd* Case No. CV 96-00106 (Dist. Ct., 2nd Dist., Dec. 6, 1996) (footnote omitted).

IV.

ANALYSIS

This petition presents no issues of law. The questions before the Commission are whether DOC established proper cause for Anderson's dismissal by a preponderance of the evidence and whether the hearing officer's findings of fact are supported by substantial, competent evidence. The hearing officer determined that DOC did not meet its burden to prove, by a preponderance of the evidence, that Anderson had engaged in misconduct under IPC Rule 190.

We limit our analysis to the issues of proof regarding the allegations contained in Exhibit 15 (the initial notice of contemplated action) and Exhibit 17 (the notice of dismissal). The charges made by DOC concerning Mr. Anderson fall into two primary categories: (1) those which relate to his handling of the White allegations; and (2) those which relate to his conduct during the IBI investigation. Each will be addressed separately.

1. Preliminary Issues.

a. Due Process.

The hearing officer observed in finding no. 23 that Anderson's first notice that DOC was contemplating a disciplinary action against him was procedurally lacking: "The notice did not set forth the specific rules and Department policies which Anderson was alleged to have violated as required by IPC Rule 190.05" Rule 190.05 provides in relevant part:

Whenever an appointing authority considers it necessary to take disciplinary action against an employee, he or she shall notify the employee and the state personnel director concurrently in writing; *and shall set forth the specific rule(s) violated* and the reasons for the action.

(*Emphasis added*). DOC does not dispute that the initial notice did not “set forth the specific rule(s) violated,” but urged at the hearing that failure to include the specific rules in the initial notice is not procedurally significant since they were provided in the dismissal notice. While both parties and the hearing officer alluded to this procedural due process issue at the hearing and on petition for review, the issue was not extensively briefed or argued. Without the benefit of full briefing and argument on this legal issue, this Commission will not rule on whether the notice of contemplated action complies with the due process requirements of *Armstrong v. State*, 123 Idaho 899, 854 P.2d 242 (1993) and *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985). While this matter is decided on other grounds, the Commission notes that it has serious concerns regarding DOC’s compliance with the due process requirements of notice and opportunity to respond in this matter.

b. *State v. Harmon.*

In its briefing, and again at oral argument, DOC directs the Commission’s attention to *State v. Harmon*, 131 Idaho 80, 952 P.2d 402 (Ct. App. 1998). DOC suggests that it was improper for the hearing officer to adopt the bulk of the findings and conclusions prepared by Anderson’s counsel. *Harmon* is a criminal case in which the magistrate directed the prosecutor to prepare findings and conclusions, then signed them without modification. The court in *Harmon* notes that the practice of having one party draft findings and conclusions is “strongly disfavored.” *Harmon* at p. 4. The court states:

A court’s delegation to one party of the task of preparing findings and conclusions, or a court’s wholesale adoption of one party’s draft risks undermining the litigants’ confidence in the outcome of their case and in the integrity of the judicial process in general. Hence, we do not endorse the magistrate’s practice here.”

Harmon at p. 5. The court goes on to note, however, that while disfavored, such a practice does not constitute reversible error: “findings of fact supported by the evidence and conclusions of law

correctly applying legal principles to the facts found will be sustained on appeal regardless of their source.” *Harmon* at p. 5, citing *MH & H Implement, Inc., v. Massey-Ferguson, Inc.*, 108 Idaho 879, 881, 702 P.2d 917, 919 (Ct. App. 1985).

In this matter, both parties submitted proposed findings and conclusions. The hearing officer adopted substantial portions of the findings and conclusions proposed by Anderson, but did not adopt them without change, as evidenced by the comparison copies submitted to the Commission with DOC’s briefing. While *Harmon* is instructive, the hearing officer’s actions in this case differed substantially from those of the magistrate in *Harmon*, and in any event, do not constitute reversible error.

2. Anderson’s Handling of Inmate White’s Allegations.

A careful review of the notice of contemplated action and the dismissal notice reveals two main issues here: the manner in which Anderson endeavored to investigate White’s claims, and his failure to report White’s claims to the warden. These issues were addressed in finding nos. 6-9 of the hearing officer’s decision. DOC admitted in its brief, and again at oral argument, that finding six is essentially correct. Finding seven was not discussed by DOC in the brief or at oral argument. Findings eight and nine were, DOC urges, “blatantly” inaccurate.

a. Anderson’s handling of White’s complaint.

The following facts are undisputed: Inmate White verbally reported Pribble’s conduct to CO Weeks. CO Weeks’ supervisors were both unavailable at the time that White made her verbal complaint. Although Anderson was not in CO Weeks’ chain of command, Weeks reported the allegations to Anderson in the absence of her supervisors. Anderson had no training in the handling of sexual harassment complaints. Anderson convened a meeting which included CO Pribble, CO Weeks, Sgt. Smith, and inmate White, in an attempt to sort out White’s charges. Pribble denied the

charges. There was some discussion of White's veracity in light of the offenses for which she was incarcerated.

The hearing officer wrote in finding eight that:

Anderson testified that he was not experienced in conducting investigations of inmate complaints but that the procedure of bringing the parties together to get to the bottom of the matter was an acceptable method from his professional standpoint. Warden Arave testified that this procedure had been employed by the Department in the past but that the Department had moved away from it in cases involving sex complaints. The Department made no showing that the procedure violated any established Department policies in effect at the time.

Findings of Fact, Conclusions of Law and Order, p. 4. DOC does not dispute that Anderson had no training in handling sexual harassment issues. Neither does it dispute that Anderson had no experience investigating inmate complaints. There was credible testimony that the confrontational method used by Anderson to "investigate" inmate White's allegations was not, perhaps, the best or preferred method for handling such a sensitive issue. We agree. There is no evidence in the record, however, to support DOC's claim that the finding was incorrect in determining that the conduct of the meeting violated no department policy. The only policy that DOC proffered on this point was its policy on sexual harassment (policy 201, Exhibit 6). The policy, even if applicable to an inmate complaint, does not prohibit the type of meeting that Anderson conducted.

b. Anderson's failure to report the White incident.

DOC next argues that Anderson violated department policy by failing to report the White incident to warden Arave. The department references two policies regarding reporting issues: Policy 105-A entitled "Reporting Major Incidents" (Exhibit 5); and Field Memorandum 103-10-20 entitled "Communication Between Inmates, Management Staff and the Warden" (Exhibit 4). DOC takes issue with the hearing officer's finding nine which states:

The White matter was a security matter. Security personnel, in this case Sgt. Smith, had the responsibility for determining whether the matter should be reported and for making any required report. Anderson and Smith determined that the White allegations were unfounded and not subject to being reported. Smith did note the matter in Officer Pribble's tracking file. Later Smith told Anderson that he had mentioned the matter to his supervisor, Lt. Jefferies.

Findings of Fact, Conclusions of Law and Order, p. 4 (citations omitted). DOC argues that this finding was in error because it was clear that Anderson was to report assaults (even falsely alleged ones) to Warden Arave. There was substantial testimony to support a conclusion that reporting such allegations was a judgment call, and even director Spalding admitted that the reporting procedures within IMSI and DOC during the period in question were unclear (Exhibit 125). Further, it was clear from the record that Warden Arave actively discouraged written reporting.

While the testimony was conflicting, there was substantial, competent evidence that inmate complaints against guards were commonplace and would certainly not be considered an "unusual problem" requiring reporting under the field memorandum. The fact that the matter was pursued and that Anderson, Smith and Weeks all concluded that the allegations were untrue contributed to the view that this was a "non-event."

Examined in isolation, and at the time that the incident occurred, the allegations by inmate White did not amount to a "major incident" which would require reporting under policy 105-A. Inmate complaints were a day-to-day commonplace in RDU, as they are throughout the correctional system. It was handled as a routine matter. It was only after the Pribble incident came to light that the importance of this seemingly insignificant event became clear. The fact remains that based on the information available at the time, Anderson made a reasonable decision about the need to report the incident up the chain of command. The fact that he (together with his co-workers Smith and Weeks) turned out to have misjudged the situation is not proof that his judgment was flawed, or that he violated the admittedly unclear reporting policies of the department.

DOC's use of these events as grounds for dismissal of Anderson has another flaw. These were events which occurred in June, 1994. Anderson's supervisors were fully aware of Anderson's handling of and failure to report the White allegations in August of 1994. Subsequent to DOC's receipt of this knowledge, Anderson received two performance evaluations. The first, for the period from December 1993 through August 25, 1994, shows that Anderson was marked down for handling of issues related to the Pribble incident, but still received a "fully satisfactory" rating. Anderson's rating does not support DOC's argument that he was a violation of Rule 190.01.a.. The second evaluation, for the period of December 1994 through December 1995, (which included his voluntary demotion to human services supervisor) rated him as "above satisfactory." By the time that Anderson was terminated in the fall of 1996, these events were old news and did not provide a valid justification for his dismissal. DOC's argument that personnel actions were held in abeyance pending the outcome of litigation brought by Pribble's victims was unpersuasive.

3. Anderson's Conduct During the IBI Investigation.

The second basis relied upon by DOC as justification for Anderson's dismissal was his failure to cooperate in the IBI investigation into the Pribble incident. Failure to cooperate in an investigation is a violation of DOC policy 217-A, Section 2, 2. Again, there appear to be two primary components to this argument: First, that Anderson was untruthful or evasive in responding to IBI investigators; and second, that he withheld documents from the investigators. Finding nos. 15, and 18-20 relate to these issues. DOC did not dispute any of these findings in its briefing, and only mentioned finding fifteen in passing during oral argument.

a. *Anderson's truthfulness in investigative interviews.*

DOC did a thorough job at the hearing and in the subsequent briefing to tease out every inconsistency in Anderson's testimony, particularly with regard to the documents which he had in his possession. It was Anderson's *three* interviews and *two* polygraphs which provided much of the

inconsistency on which DOC based its conclusions that Anderson was uncooperative. The interviews occurred more than a year after the events in question. The polygraph examinations occurred nearly two years after the events in question. The transcript evidences much confusion, and little clarity. But lack of clarity, confusion, and fading memory do not amount to a lack of cooperation. The polygraph examiner testified that Anderson was being cooperative. The IBI investigators disagreed, but admitted that many other DOC staff, including Director Spalding, ISCI Warden Paskett, and former ISCI Warden Arave had been far less candid and forthcoming and had engaged in behavior that was more detrimental to the investigation.

b. Anderson's failure to turn over documents.

In late summer of 1994, as the Pribble incident came to light, employees throughout the DOC were ordered to send all documents relating to the Pribble matter to Boise. As we now know, those documents were destroyed. At the same time, Anderson began to have concerns about his position. He believed that warden Arave was not supportive of RDU in general, and Anderson's relationship with Arave seemed to be deteriorating as well. Anderson had the RDU secretary, Lois Rivers, make him copies of the RDU files which he took to his home. Thereafter he kept copies of RDU documents at his home. At some time in the fall of 1994, Sgt. Smith gave Anderson a copy of Pribble's tracking file for safekeeping. Anderson testified that he took the file home and put it with his other documents and forgot about it. When the IBI investigators asked for copies of documents during their investigation a year later, Anderson had Rivers provide copies of all the RDU documents. The documents he had at his home were (with the exception of the file Sgt. Smith gave him), duplicates of these RDU files which had already been turned over. Because they were duplicates, he did not mention their existence or offer to turn them over.

Although DOC argued strenuously to the contrary, Anderson's testimony regarding the discovery of Smith's file is consistent. On the evening before the first polygraph, while reviewing

some of his documents at home, Anderson came across the Pribble tracking file Sgt. Smith had given him. The file contained mostly training records, but did include one document which appeared to be a notation pertaining to the White incident. Anderson was understandably nervous about finding the documents, revealed their existence the next day during the pre-test interview with the polygraph examiner, and turned the documents over to the examiner at the time of the second exam.

The IBI investigators agreed that there was nothing in the tracking file that shed any light on the investigation into the Pribble incident. The one document which might have been relevant, the notation about the White incident, was unsigned and undated. The investigators agreed that the file was created and maintained by Smith, and if anything, supported Anderson's claims that he and Sgt. Smith had discussed making a notation in Pribble's file about the White allegations. Anderson's failure to recall he had the Smith file and turn it over did not impede the investigation, and would have done nothing to further it.

Anderson participated in three interviews with IBI investigators, answered fully all questions put to him by director Spalding, and voluntarily submitted to two polygraph examinations. Anderson's testimony contained inconsistencies, memory lapses, and was confusing at times, but DOC failed to prove that it was intentionally evasive or that Anderson lied. Anderson instructed his secretary to turn over all documents to the IBI investigators. As soon as he became aware that he had Sgt. Smith's copy of the Pribble tracking file, he turned that over, even though it contained nothing of import. Even the investigators who did not believe Anderson was entirely forthcoming agreed he was more cooperative than the majority of the principals in the Pribble incident.

4. Summary.

Although DOC has challenged most of the hearing officer's findings, the department chose to elaborate on only a few of the findings in its briefing and at oral argument. Bare assertions of

error, without more, are not sufficient to convince this Commission to overturn a decision of the hearing officer. In particular, the findings which relate to the notice of contemplated action and dismissal notice (findings 22-26) were not addressed by DOC in any substantial way. The record provides ample support for the hearing officer's conclusion that DOC failed to prove, by a preponderance of the evidence, that Anderson had violated DOC policies and IPC Rules 190.01.a and e. The hearing officer's findings are supported both by testimony and by documentary evidence. We find that the hearing officer's findings of fact and conclusions of law are supported by substantial, competent, and credible evidence. We find that the Department of Corrections acted without a reasonable basis in fact or law in filing this petition for review and award attorney fees and costs on the petition for review to Anderson.

V.

CONCLUSION

For the reasons stated above, we AFFIRM the decision of the hearing officer, including the award of attorney fees and costs. Anderson is awarded attorney fees and costs on the petition for review. DOC is ordered to reinstate Anderson with full back pay and benefits.¹

VI.

STATEMENT OF APPEAL RIGHTS

Either party may appeal this decision to the District Court. A notice of appeal must be filed in the District Court within forty-two (42) days of the filing of this decision. Idaho Code § 67-5317(3). The District Court has the power to affirm, or set aside and remand the matter to the Commission upon the following grounds, and shall not set the same aside on any other grounds:

- (1) That the findings of fact are not based on any substantial, competent evidence;

¹ Commissioner Tankersley did not participate in this decision.

- (2) That the commission has acted without jurisdiction or in excess of its powers;
- (3) That the findings of fact by the commission do not as a matter of law support the decision. Idaho Code § 67-5318.

DATED this 2nd day of July, 1998.

BY ORDER OF THE
IDAHO PERSONNEL COMMISSION

/s/_____
Sherry Dyer, Chair

/s/_____
Peter Boyd

/s/_____
Ken Wieneke

/s/_____
Don Miller

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Decision and Order on Petition for Review in *Anderson v. Idaho Dep't of Correction*, IPC No. 96-11, was delivered to the following parties by the method stated below on the 2nd day of July, 1998.

FIRST CLASS MAIL

Jim Jones
Jim Jones & Associates

1275 Shoreline Drive
Boise id 83702

STATEHOUSE MAIL

Mia Murphy
Deputy Attorney General
Civil Litigation Division
Office of the Attorney General
Statehouse Mail

Tim McNeese
Deputy Attorney General
Civil Litigation Division
Department of Correction
Statehouse Mail

/s/_____
Val E. Rodriguez